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No. 07-991

In The
Supreme Court of the United States

DAVIDSON MOMAH,

Petitioner,

v.

NAOMI C. EARP, Chair, United States Equal Employment Opportunity Commission, and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Respondent's brief shows reason why the Court should vacate the Sixth Circuit Court of Appeals decision.

The decision of the Sixth Circuit Court of Appeals suggests that an employer is immune from liability for engaging in different treatment of similarly situated employees with respect to its terms, conditions, and privileges of employment, even if it frustrates statutory protected rights. Different courts of appeals have approached this issue differently. There is a need for uniformity.

The Sixth Circuit Court of Appeals declined to adopt the standard set forth by the Court in *Burlington Northern Santa Fe Railway v. Sheila White,* 126 S.Ct. 2405 (2006), *Mt. Health City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and *Clark County School District v. Shirley A. Breeden*, 121 S.Ct. 1508 (2001), in deciding a retaliatory discrimination before granting summary judgment. In so doing, the Sixth Circuit of Appeals construed evidence in light most favorable to the Respondent. This violates this Court's decision in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. A HARDSHIP TRANSFER THAT THE RESPONDENT ROUTINELY GRANTS AS A MATTER OF PRACTICE IS A MATERIAL TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT. HENCE, THE DENIAL OF A HARDSHIP TRANSFER CONSTITUTES AN ADVERSE EMPLOYMENT ACTION.

The Respondent asserts that as a matter of law the failure to effectuate a lateral transfer is not a personnel action sufficient to trigger the discrimination laws. In taking the above position, Respondent failed to distinguish what triggers a hardship transfer (medical reasons) and none hardship transfer. Without refuting whether a hardship transfer is part of the Respondent's policy and practice, Respondent coincides that it has a practice of granting hardship transfers. Instead, Respondent argues that the Sixth Circuit application of objective or materiality standard to adverse employment action is consistent with several other circuits.

While Respondent points out that most of the cases Petitioner cited deals with retaliatory discrimination, Respondent also acknowledges that "some courts of appeals used to apply the same adverse employment action standard" to substantive provision of Title VII discrimination cases while some (5th and 8th circuit courts) applied a different standard until *Burlington* decision. (Resp, p. 10, 13, 14). The Court in *Burlington Northern* rejected the court of appeals' application of

an ultimate employment action or objectivity standard method of analysis (employment status) in a retaliation case. The Court reaffirmed that the substantive provision of Title VII, Section 703(a) was designed to prevent injury terms, conditions and privileges of employment. 126 S.Ct. at 2410-12.

The *Burlington Northern* decision on substantive provision of Title VII is consistent with the Court's decision in *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). The Court noted that for an employment action to be actionable, the employer's action must cause a "significant change in employment status such as hiring,..., falling to promote, ..., or a decision causing a significant change in benefits."[1]

However, *Burlington Northern* arguably did not resolve the conflict among the circuits regarding the standard for an adverse employment action under the

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[1] The decision to deny Petitioner's hardship request to ***any position*** which is part of Respondent's practice resulted in a significant loss of the Petitioner's annual and sick leave, loss of locality pay, repeated questioning of leave usage to go to Detroit, placed on AWOL, reduction in salary because Petitioner had to utilize leave without pay to go to Michigan and take his daughter to hospital and to carry out the assignment imposed upon him the Oakland County court, extreme work related stress that would not occurred in Detroit made any position in Detroit more desirable because Petitioner could have adjusted his work schedule in order to accommodate the above needs, something he could not do while he was in Memphis or Indianapolis due to distance. Respondent's decision ***closed all opportunities for Petitioner to ever compete and work in Detroit in any position.***

substantive provision of Title VII. Respondent argued that Petitioner's reliance on the Ninth and First Circuits is misplaced because they dealt with retaliation cases. (Resp. P. 11). However, Respondent cited *Marrero v. Goya of Puerto Rico, Inc.*, 304 F. 3d 7(1st Cir. 2002), which dealt with a retaliation issue while discussing the substantive aspect of Title VII. The *Marrero* decision actually supports Petitioner's position. *Marrero* "rejected any bright line rule that a transfer cannot qualify as an adverse employment action' unless it results in a diminution in salary or a loss of benefits." *Id.* at 24.

Regarding denial of transfer being an adverse employment action, Respondent acknowledges that the standard for determining adverse employment action by both the Fifth and Eight Circuits (ultimate employment action), is in conflict with the standard used by the Sixth Circuit. (Resp. p. 14). Respondent argues that this conflict is of no benefit to Petitioner. ***Nevertheless, it is still a conflict***. The Fifth Circuit in *Alvarado v. Texas Rangers*, noted that a denial of transfer can be considered a "denial of promotion, if the position sought is objectively better, even if the new position would not have entailed an increase in pay..." *Alvarado v. Texas Rangers*, 492 F. 3d 605, 614 (5th Cir. 2007).

The Fifth circuit listed factors that it considered a measure of a true objectivity test which includes but not limited to increase in compensation or other tangible benefits. *Alvarado*, 492 F. 3d at 614. Based on the totality of the evidence presented before the Sixth Circuit including that Respondent ***closed all***

opportunities for Petitioner to ever compete and work in Detroit in any position, the Fifth Circuit is more likely to conclude that Petitioner showed that he suffered an adverse employment action.

Respondent cited *Simas v. First Citizens Federal Credit Union*, 170 F. 3rd 37 (1st Cir. 1999), to reiterate that the First Circuit's standard is in line with the Sixth Circuit objectivity test. *Simas* did not deal with the substantive provision of Title VII. *Simas* is applicable to the retaliation provision of Title VII. However, considering the Court's decision in *Burlington Northern*, *Simas* application to the retaliatory discrimination is misplaced.

If *Simas* and *Marrero* are to be applied to the substantive provision, a conflict exists among these circuits as to what constitutes an "objective test and materiality test." Under the Sixth Circuit, materiality test is whether a "change in the terms or conditions of employment is characterized by a decrease in wages, a less distinguished title, material loss of benefits..."[2] The First Circuit rejected the view "that a transfer cannot qualify as an adverse employment action unless it results in a diminution in salary or a loss of benefit." *Marrero*, 304 F. 3d at 24-25. The First circuit noted in *Simas* that materiality is determined on case by case basis cast in objective terms.

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[2] However, the Sixth Circuit provided no clear definition of what it means by "other indices that might be unique to a particular situation." Without a clear definition, the test implicates subjectivity test.

The Tenth circuit noted in *Piercy* that a "desired transfer" was not "a truly lateral transfer" if evidence shows that it would be less arduous and stressful than the plaintiff's current job and would increase the plaintiff's opportunity for obtaining additional job and leave flexibility." *Piercy v. Maketa*, 480 F. 3d 1192, 1205 (10th Cir. 2007) cited in *Beyer v. County of Nassau, et al*, Docket No. 06-4930-cv (2nd Cir. 2008). Hence, the Tenth Circuit concluded that denial of a lateral transfer could constitute an adverse employment action.

Therefore, even within the circuits that use the "materiality test and objectivity test" some conflict exist as to the true measure of the test without implicating subjectivity exist.

Respondent further argued that the court of appeal's decision in this case is "a fact-bound determination that does not warrant this court's review." (Resp. p. 16). Respondent suggests that the Court should not review 'a fact- bound case' even if the Sixth Circuit's application of its standard is contrary to the Court's standard. However, Respondent cited no authority that prohibits this Court from reviewing the case to ensure that lower courts are following the Court's legal standards in deciding the case.

Respondent further noted in its footnote "even assuming *arguendo* that the court of appeals improperly determined that petitioner had failed to establish a prima facie case of discrimination, this case would be inappropriate for certiorari because the court of appeals decision that the EEOC was entitled to

summary judgment is correct on other grounds." (Resp. 16). However, Respondent failed to cite what other ground the Sixth Circuit relied on in granting summary judgment in all the issues ***including those issues that Respondent intentionally refused to investigate and the Sixth Circuit did not address***.

In granting summary judgment to Respondent on its second motion for summary judgment, the district court violated this Court standard in *Reeves* by ***weighing and assessing credibility*** of the witnesses in light most favorable to Respondent in spite of credible records Petitioner presented to the district court and the Sixth circuit that showed that the reasons advanced by the Respondent were all false. (Pet. Rep. App. p.4a thru7a).

The Court's involvement is needed in order to bring a uniform interpretation of adverse employment action (denial of hardship transfer) under substantive provision of Title VII.

2. THE SIXTH CIRCUIT COURT OF APPEALS INCORRECTLY HELD THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT IN THIS TITLE VII RETALIATION CLAIM.

The Court held in *Reeves,* that a district court violates this Court standard of summary judgment if it ***weighs and assesses credibility*** of the witnesses and the parties in light most favorable to the moving party. And that ***weighing and assessment of credibility*** is a duty that belongs to the jury.

The Court noted:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe... That is the court should give credence to the evidence favoring the non movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 152 (2000). Also see *Hunt v. Cromaritie,* 119 S.Ct. at 1551-2 (1999); *Anderson v Liberty Lobby*, 477 US. 242, 248 (1986); and *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

The Respondent contends that the Sixth Circuit granted summary judgment based on the record. (Resp. Res, p. 16). Respondent's position did not show why the Sixth Circuit suggested in its previous decision that retaliation claims failed for lack of adverse employment action and not causation, even without reviewing several timely raised claims that were not related to transfer that Respondent refused to investigate.[3] However, if the Sixth Circuit had weighted and assessed the evidence such as pleading, depositions, answers to interrogatories, affidavits

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[3] Ironically, Respondent failed to note that during its first motion to dismiss, its attorneys advised the district court that some issues need to be resolved at a trial. (Pet. Rep. App. 1a thru 3a).

along with other exhibits, as a whole in light most favorable to Petitioner, it would have discredited Respondent's explanation for its conduct as not believable. (Pet. Rep. App. 4a-7a).

The Respondent further contends that *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); and *Wilkie v. Robbins,* 127 S.Ct 2588 (2007) involved non-Title VII cases, Respondent cited no authority that shows that the Court is bound only by Title VII cases while determining Title VII causation. In any event, Respondent's argument supports Petitioner's use of the motivating or substantial factor test standard set forth by this Court in *Mt. Healthy* and *Wilkie* in determining Title VII causation. Respondent argues that for the Petitioner to show causation, he must show that retaliation motivated Respondent's subsequent actions. (Resp. Res. p. 18). The Respondent concedes that the Sixth Circuit did not frame its standard in terms of motivating or substantial factor. Neither did it evaluate the records in order to determine the motivating or substantial factor and the proximity of events before rejecting the causation issue.

The four ways of showing causation (motivating or substantial factor and Proximity of Events) are:

(1) Evidence that after learning of the opposition, the employer treated the employee differently from similarly situated nonprotected employee;
(2) Evidence that after learning of the opposition, the employer treated the

Employee differently than before the protected activity, including evidence that the employer began surveillance;

(3) Closeness in time between the employer's knowledge of the protected opposition or participation and the adverse activity; and

(4) attempts to conceal the fact that the person who decided on the adverse action knew at that time the employee had engaged in protected participation or opposition.

See Barbara Lindermann Schlei & Pual Grossman, *Employment Discrimination Law*, p. 558-9 (2nd ed. 1983); *Clark County School District*, 121 S.Ct at 1511.

Respondent contends that *Burlington Northern* is not applicable to the causation. Respondent is incorrect. Causation would not be determined in the absence of an adverse employment action. The Court recognized this when it noted that "***the significance of any given act of retaliation will often depend upon the particular circumstances***." *Burlington Northern*, 126 S.Ct. at 2415. *Burlington Northern* ***requires a court to look a the full context of an employer's action and its impact on the employee***. *Id* at 2412-13, 2417. Hence, *Burlington Northern* is applicable to Title VII causation issue.

Under *Burlington Northern*, an evaluation of the particular circumstances would help in determining the above mentioned four ways of determining if causation exist, and not the ***Walborn v. Erie County***

Care Facility, 150 F. 3d 584, 589 (6th Cir. 1998) standard which was decided before Burlington Northern. If Walborn is allowed to stand, it would undermine this Court standard on causation.

In order to justify the Sixth Circuit application of *Walborn*, Respondent argued that employment action that pre-dates protected activity cannot be retaliatory and if continued after the filing of an EEO complaint, does not show causation. (Resp. p. 18). The Petitioner's contention is that the Sixth Circuit ***summarily*** disregarded the informal EEO complaints that Petitioner brought to Respondent's attention including an opposition to Mr. Walt Grabon's requiring Petitioner to stay and assist Judge Barbara Kimmelman, white female, as a prerequisite for gaining a hardship transfer prior to 1999 formal EEO complaint. ***Furthermore, the Sixth Circuit disregarded all the formal EEO complaints filed within weeks after 1999 that did not relate to a hardship transfer without following this Court standards in Burlington Northern, Clark, Mt. Healthy, and Wilkie in determining causation.***

In any event, Respondent failed to answer critical questions such as: (1) why did Mr. Grabon who had asked Petitioner to give him six months suddenly change his position and tell Petitioner to get his grant for a transfer request from Washington DC? (2) What happened in Washington DC to make Mr. Soto, Ms. Thornton and Mr. Grabon so angry with Petitioner which resulted in a ***flat-out*** denial of Petitioner's request within three weeks of visiting Washington DC?

(3)What prompted Mr. Grabon to tell Petitioner "***filing an EEO complaint is like falling off the wagon***"?(4)Why did Mr. Neely who had told Petitioner that he was not involved in granting transfers suddenly become involved and turn against the Petitioner? (6) What made Mr. Neely comment about him and Mr. Grabon sharing a few stories about the Petitioner? (7) Why was Petitioner who had an excellent performance record suddenly denied promotions and selections to several positions with the Respondent?, among others

The fact that the Petitioner did not proceed with a formal complaint for the denial of his hardship transfer in 1998, does not make his informal EEO complaints about denial of transfer and opposition to Mr. Grabon's decision a non protected EEO activity.

While Petitioner cannot recover damages for an untimely filed complaint, untimely complaints are admissible as evidence, to show that retaliation was a substantial or motivating factor in the subsequent treatment receive by Petitioner. *National Railroad Passenger v. Morgan*, 122 S.Ct. 2061, 2072 (2002). ***All the non-EEO employees*** similarly situated, received better treatment.

The Sixth Circuit erred by failing to follow neither the Court's proximity standard nor substantial nor motivating factor test in determining causation.

Respondent stated in its footnote that Petitioner "misunderstands the court's use of the phrase "assuming arguendo." Petitioner did not

misunderstand the phrase 'assuming arguendo'. Assume means "suppose as a fact; pretend; or put on deceitfully". Arguendo means "arguing or in the course of the argument." *New Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition; Black's Law Dictionary with Pronunciation, 6th ed.* The Sixth Circuit noted that "assuming arguendo", meaning that if it were to ***assume, pretend, or suppose*** for the sake of argument that an adverse employment action standard has been met. The Sixth Circuit's assumption shows that it did not believe that Petitioner had met the prima facie for adverse employment. This suggests that Petitioner has to show employment connected status in order to establish an adverse employment action. This is contrary to the decision in *Burlington Northern*.

Finally, Respondent provided no set of facts or legal standard that the Sixth Circuit relied on in dismissing subsequent EEO complaints that Respondent refused to investigate though the claims were timely raised before the Respondent's EEO office and the district court.

CONCLUSION

Based on the foregoing reasons, Petitioner prays this Court to grant his petition for certiorari and remand the case to the district court for trial. However, if the Court determines in its infinite wisdom that there is no adverse employment action based on the denial of a hardship transfer, to remand the retaliation claim to the district court for trial or the subsequent complaints that the Sixth circuit

would not address back to the Respondent for counseling and investigation. This would prevent a proper case of discrimination from being disposed of on summary judgment.

Respectfully submitted,

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